ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JUDGE DAVID M. GLOVER

DIVISION III

CA06-410

February 7, 2007

JOSEPH LAMB APPELLANT	APPEAL FROM THE ARKANSAS WORKERS' COMPENSATION COMMISSION [F211988]
V.	
LONOKE COUNTY & AAC RISK MANAGEMENT SERVICES APPELLEES	AFFIRMED

Appellant, Joseph Lamb, sustained a compensable back injury on October 12, 2002, when he worked for appellee Lonoke County as an inspector at a solid-waste management station, *i.e.*, a landfill. The parties stipulated that appellant was paid temporary-total disability benefits from the date of the injury through June 2, 2003, and that appellant was assessed a ten-percent impairment rating to the body as a whole, which appellees accepted and paid. The ALJ was presented with the issue of whether appellant was entitled to wage-loss benefits above the ten-percent impairment rating. The ALJ denied the claim, determining that appellant failed to prove that he was entitled to wage-

loss disability over and above the impairment rating. The Commission affirmed and adopted the ALJ's opinion. We affirm the Commission.

At the hearing before the ALJ, appellant testified that he was forty-nine years old; that he had a sixth-grade education; and that he had no additional educational or vocational training. He explained that he worked for Lonoke County for ten years; that he worked as an inspector at the solid-waste transfer station; and that his duties included checking out loads and making sure that persons did not throw the wrong type of material into the landfill. He stated that his job tasks ranged from picking up 250 trash bags to operating a back hoe to opening a twenty–foot gate that had been damaged for about five years.

Appellant explained that on October 12, 2002, he was pulling open a gate that he had "opened thousands of times" when he lost his footing and fell on top of a sand rock and injured his back. He said that he never returned to his job after that date. He testified that prior to this back injury, he had no problems with working or attendance. Eventually, he underwent back surgery and was assigned a ten-percent impairment rating on June 2, 2003.

Appellant acknowledged that his employer told him that he could come back to work at the facility and that he responded that he could not because "there's nothing I can do," and that he did not want to take a chance on reinjuring himself. He commented on a surveillance video that was taken of him on his property, describing it as a five-minute video that did not "give the full picture." In responding to questions about the video

surveillance of him, he acknowledged that "looking at that video it doesn't look like I'm disabled." He said, in essence, that sometimes he is fine and then, within minutes, he will be doubled up and unable to walk. Appellant testified about his limited work history, stating that he had cared for his parents until he was thirty-nine years old, that he had run an auction house on his property, and that he had been in the aluminum-can recycling business for a short time. He stated that he has trouble sleeping and that he has cramps in his leg.

Appellant explained that his county job paid $7.50 per hour; that he had not looked for any other jobs paying that amount; and that he had not applied for employment anywhere. He acknowledged that according to his functional-capacity evaluation he could perform his county job, but he stated that he disagreed.

In response to questions from the ALJ, appellant acknowledged that he lived on thirty acres that he owns, that he feeds his horses and chickens, and that he mows at times. Concerning the county's offer of his old job, appellant responded that he did not even attempt to go back because he could not sleep, he was having pain in his leg, and he did not know of anything that he could actually do — "I just decided that I shouldn't and that it wouldn't work out."

Appellees introduced the affidavit of Jim Depriest, appellant's supervisor, which stated that he had offered appellant the same job at the same pay after he was released by his doctor but that appellant had told him that he was not ready to return to work then and that he had not tried to return to work since that time.

For his sole point of appeal, appellant contends that the Commission's denial of his claim for wage-loss benefits is not supported by substantial evidence. We disagree.

When a workers' compensation claim is denied, the substantial evidence standard of review requires us to affirm the Commission if its opinion displays a substantial basis for denial of the relief sought by the worker. *Whitten v. Edward Trucking/Corporate Sol.*, 87 Ark. App. 112, 189 S.W.3d 82 (2004). In reviewing Commission decisions, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirm the decision if it is supported by substantial evidence. *DeQueen Sand & Gravel Co. v. Cox*, 95 Ark. App. 234, ____ S.W.3d ____ (2006). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *Id*. It is the Commission's function to determine witness credibility and the weight to be afforded to any testimony; the Commission must weigh the medical evidence and, if such evidence is conflicting, its resolution is a question of fact for the Commission. *Id*.

In rendering her decision, which was affirmed and adopted by the Commission, the ALJ explained:

> In this case, while it is true that claimant has limited formal education, he is a relatively young man who is, by his own testimony, able to maintain thirty acres of land by himself, including mowing and caring for his horses and chickens. The FCE, to which claimant submitted, showed inconsistent and unreliable effort on

claimant's part; and, the findings of the FCE indicate that claimant could return to his former job with respondent-employer.

Moreover, surveillance received into evidence showed claimant performing duties that would be very similar to the job he held prior to the accident on October 12, 2002, and indicated no limping or any obvious pain or disability on claimant's part. Finally, claimant admitted that he was offered to return to his job with respondent-employer within his restrictions but chose not to even *attempt* to return to work at all. He further testified that he has not looked for other employment. This certainly evidences a lack of motivation on his part to return to work at all, thereby impeding this examiner's ability to assess claimant's loss of earning capacity. In this examiner's opinion, claimant's contention that he is unable to return to his former job, or any job, is simply not credible.

Appellant contends in part that "the fallacy in the ALJ's opinion ... is that it jumps to the non-medical evidence and completely disregards any medical evidence"; that there "is no medical report stating claimant can return to any job above light duty, in fact the medical evidence taken as a whole tends to show the claimant will never be able to return to meaningful employment"; that the "ALJ considered only three things: (1) the FCE, (2) the video, (3) the job offer"; and that the "FCE should not be the main or only evidence in considering claimant's wage-loss disability [because the FCE] erroneously classifies his job as light duty ...." We do not find appellant's arguments to be convincing.

Appellant summarizes the medical evidence supporting his position as follows:

A. Dr. Weber, report dated 11/13/02, "He has missed some work because of this and tells me that he has missed more work in the last month than he did in the previous 10 years working for this company."

B. Dr. Wayne Bruffet, report dated 12/2/02, "he describes his job as being very busy and it is something where he never stops for problems 12 - 15 hours in a day."

C. Dr. Wayne Bruffet, report dated 02/17/03, "He says that he is not really having much trouble today but there are days when his thigh is quite painful for him" ... "In talking to Mr. Lamb, I don't think there is any light duty available for him out at his job. I certainly do not think he is ready to return to full duty yet."

D. Dr. Wayne Bruffet, report dated 4/7/03, "I think it is reasonable that Mr. Lamb be released to work. If his job terminated then this might be a moot point but I still think he ought to be capable of working with no lifting greater than 20 pounds, no repeated bending, twisting, or stooping."

E. Dr. Wayne Bruffet, "I think Mr. Lamb is essentially at a point of maximum medical improvement. I would recommend a functional capacity evaluation to see what he is capable of doing. If this shows that he can return to his previous occupation, then I certainly think that is a good place for him because it sounds like he is very knowledgeable and proud of his job. He has always told me that he would love to return to his previous job but he just does not think he can perform in that capacity. If they have something else that he can do, based on the results of his FCE, I think this would be even better because it is going to be difficult for him to find some other line of work given the fact that he cannot read or write. If there is nothing available for him with his previous employer, then he may have to find some other line of work or he may consider applying for Social Security Disability. I would certainly support him in this if he goes this route because I think he is doing the very best that he can."

F. Dr. Wayne Bruffet, 6/2/03, "He is probably capable of returning to some light duty based on the results of his FCE."

G. Dr. Charles Shultz, reports dated 7/29/03 - 12/9/2004, these reports consistently display that claimant has lower back pain with radicular pain and paresthesias in the right lower extremity. (See also EMG/NCS dated 21 Aug 03 R's ex pg 27-28). Additionally while all of these reports state "Patient states he is unable to work currently..." several of them also state "However, he continues to have pain symptoms to the point he is unable to return to work."

Arkansas Code Annotated section 11-9-522 (b) and (c) (Repl. 2002) provide:

(b)(1) In considering claims for permanent partial disability benefits *in excess* of the employee's percentage of permanent physical impairment, the Workers'

Compensation Commission may take into account, in addition to the percentage of permanent physical impairment, *such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity*.

(2) *However, so long as an employee*, subsequent to his or her injury, has returned to work, has obtained other employment, or *has a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than his or her average weekly wage at the time of the accident, he or she shall not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by a preponderance of the medical testimony and evidence.*

(c)(1) *The employer or his or her workers' compensation insurance carrier shall have the burden of proving the employee's employment, or the employee's receipt of a bona fide offer to be employed, at wages equal to or greater than his or her average weekly wage at the time of the accident.*

(2) Included in the stated intent of this section is to enable an employer to reduce or diminish payments of benefits for a functional disability, disability in excess of permanent physical impairment, which, in fact, no longer exists, or exists because of discharge for misconduct in connection with the work, or because the employee left his or her work voluntarily and without good cause connected with the work.

(Emphasis added.)

While the Commission opinion acknowledges the fact that appellant was offered his old job, it seems to do so only in the context of whether appellant lacked the motivation to return to work. The opinion does not specifically address the applicability of section 11-9-522 (b)(2), which contains an exception to wage-loss benefits in excess of an employee's percentage of permanent-physical impairment in cases where the employee has received a bona fide offer of employment at wages equal to or greater than his or her average weekly wage at the time of the accident. Consequently, we examine

the Commission's decision only under subsection (b)(1), which allows the consideration of such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity.

Pursuant to Arkansas Code Annotated section 11-9-522, when a claimant has been assigned an anatomical-impairment rating to the body as a whole, the Commission has the authority to increase the disability rating, and it can find a claimant totally and permanently disabled based upon wage-loss factors. *Logan County v. McDonald*, 90 Ark. App. 409, 206 S.W.3d 258 (2005). The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Id.* The Commission is charged with the duty of determining disability based upon consideration of medical evidence and other matters affecting wage loss, such as the claimant's age, education, and work experience. *Id.* In considering factors that may affect an employee's future earning capacity, the court considers the claimant's motivation to return to work, since a lack of interest or a negative attitude impedes our assessment of the claimant's loss of earning capacity. *Id.*

Contrary to appellant's assertion that "the medical evidence taken as a whole tends to show the claimant will never be able to return to meaningful employment," it is clear from appellant's own summary of the medical evidence that it establishes no such thing. Moreover, our review of Dr. Schultz's medical records reveals that he merely reports that "[p]atient states he is unable to work currently secondary to his low back pain and right lower extremity pain and paresthesias."

In addition, the only dispute appellant makes in this appeal about the county's job offer to him is that the ALJ said the job offer was within his restrictions, and he contends that the appellees presented no evidence that they offered to modify his former job in any way. His argument misses the point. The ALJ's finding that appellant's job offer was within his restrictions was supported by the FCE because the evaluator consulted the employer about the job requirements and determined that appellant could do the job. In other words, the evaluator was aware of both the job's requirements and appellant's limitations.

In summary, the Commission clearly found that appellant's claims that he was unable to return to work at his old job or any other job were simply not credible. We conclude that reasonable minds could have reached the Commission's conclusion; therefore, we affirm its decision.

Affirmed.

ROBBINS and MILLER, JJ., agree.